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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of)
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)

Computer III Remand Proceedings:)
Bell Operating Company Safeguards and)
Tier 1 Local Exchange Company)
Safeguards)
)

Application of Open Network Architecture)
and Nondiscrimination Safeguards to)
GTE Corporation)
)
)

CC Docket Number 90-623

CC Docket Number 92-256

**COMMENTS OF THE INDEPENDENT DATA
COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC.**

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I. INTRODUCTION

The Independent Data Communications Manufacturers Association, Inc. ("IDCMA"), by its attorneys, hereby responds to the Commission's Public Notice seeking comments governing telephone companies' use of Customer Proprietary Network Information ("CPNI").¹

IDCMA is an association of companies, not affiliated with communications common carriers, that manufacture telecommunications equipment, including modems, multiplexers, data service units, channel service units, network management systems, and a wide variety of other devices used in data communications. IDCMA member companies are leaders in the field of

¹ Public Notice, "Additional Comments Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information," FCC 94-63 (Mar. 10, 1994).

data communications, producing technically advanced equipment in highly competitive markets and creating high skilled jobs for Americans. IDCMA has participated in almost every major proceeding before the Federal Communications Commission ("FCC"), including Computer III,² involving CPNI. It consistently has urged the FCC to prevent carriers from using information obtained as a result of providing regulated common carrier services in a manner that would give them an unfair advantage when they participate in the competitive customer premise equipment ("CPE") and enhanced services markets.

In response to the Commission's request for comments, IDCMA proposes that the BOC/GTE CPNI rules -- which currently require these carriers to obtain prior authorization from customers with more than twenty telephone lines before using their CPNI to develop and market enhanced services -- also should require these carriers to obtain prior customer authorization before using CPNI to develop and market CPE. IDCMA further proposes that this prior authorization requirement be applied to all local exchange carriers ("LECs"). Such equal application of the CPNI rules will promote even more vigorous competition in the CPE and enhanced services markets -- both between carrier-affiliated and non-carrier-affiliated CPE vendors and enhanced services providers ("ESPs") and between CPE-based and service-based solutions. Equal application of the prior authorization requirement also will protect customer privacy more fully, without impairing the efficiency of the carriers' operations.

² Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229.

II. THE CPNI RULES SHOULD BE REVISED TO REQUIRE ALL LOCAL EXCHANGE CARRIERS TO OBTAIN PRIOR CUSTOMER AUTHORIZATION BEFORE USING CPNI TO DEVELOP OR MARKET EITHER ENHANCED SERVICES OR CPE.

CPNI is information that a communications common carrier gains, as a result of providing regulated transmission services, regarding customer use of the basic communications network. As the Commission has recognized, this information is commercially valuable: it can be used to identify when a customer is in the market for CPE or an enhanced service, and may well provide information about the specific product or service needed. Consequently, access to such information by carrier personnel involved in the development and marketing of CPE and enhanced services can provide carriers with an unfair advantage over non-affiliated CPE vendors or ESPs, thereby impairing operation of the competitive market.³ In addition, because CPNI includes information regarding individual calling and use patterns, carrier use of CPNI for reasons other than the provision of regulated telephone service raises customer privacy concerns.

³ See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7611 (1991), appeal pending sub nom. California v. FCC (No. 92-70083 9th Cir.). As the Commission has recognized repeatedly, such competition has significantly benefitted consumers. See, e.g., NYNEX Telephone Companies FCC Tariff No. 1, FCC 94-53 (Mar. 22, 1994) (Competition in the CPE market "has benefitted users in numerous ways. The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks. [Competition has] also created new job opportunities in several related sectors of the economy." (footnotes omitted)).

A. The Prior Authorization Requirement Should Apply Equally to CPNI Used to Market Enhanced Services and CPE.

The CPNI current rules do not treat the CPE and enhanced services markets consistently. While the BOCs and GTE must obtain prior consent from customers with more than twenty lines before using their CPNI to develop or market enhanced services, these carriers do not need prior customer consent before using the very same information to develop or market CPE.⁴

As an initial matter, we note that the Commission's asymmetrical regulatory scheme was not adopted as a result of a deliberate policy decision that CPNI should receive more protection in the enhanced services context than in the CPE context. To the contrary, the Commission originally applied the same requirements in both contexts: the BOC CPE Relief Order⁵ (which first allowed the BOCs to provide CPE subject to non-structural safeguards) and the Computer III Orders (which first allowed the BOCs to provide enhanced services subject to non-structural safeguards) permitted the BOCs to access CPNI without prior customer authorization. However, in California v. FCC,⁶ the Ninth Circuit vacated the Computer III Orders on the ground that the Commission had failed to justify the adequacy of non-structural safeguards in preventing discrimination against non-carrier-affiliated ESPs.

⁴ See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd at 7611; Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Report and Order, FCC 94-58, CC Docket No. 92-256, ¶¶ 39-45 (Apr. 4, 1994).

⁵ Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987).

⁶ 905 F.2d 1217 (9th Cir. 1991).

In the Computer III Remand proceeding, the Commission reconsidered its decision to permit BOC personnel responsible for the development or marketing of enhanced services to access CPNI without prior customer authorization. The Commission concluded that "unrestricted access to CPNI does give the BOCs an advantage over competing ESPs in marketing enhanced services to BOC customers."⁷ In order to remedy this competitive inequity, the Commission adopted the requirement that the BOCs obtain prior authorization before using the CPNI of customers with more than twenty lines to develop or market enhanced services.

The Computer III Remand proceeding was limited to enhanced services issues; it did not provide the Commission with an appropriate opportunity to revisit its decision to allow the BOCs to use large customers' CPNI to develop and market CPE without prior authorization. The resulting disparity between the protection given to CPNI in enhanced services and CPE contexts was carried over to GTE as a result of the Commission's decision to impose the existing BOC regulatory safeguards on that carrier.

The current regulatory disparity undermines both the Commission's competitive and privacy goals. Non-carrier-affiliated CPE vendors must obtain prior customer authorization before accessing the CPNI of customers with more than twenty lines -- a difficult and time-consuming task for a firm that may not have an existing relationship with the customer. Allowing BOC or GTE personnel to use CPNI without having to first obtain customer authorization in order to develop or market CPE indisputably provides those carriers with an unfair competitive advantage. This competitive inequity would only grow worse if the current

⁷ Computer III Remand Order, 6 FCC Rcd at 7611.

restriction, contained in the Modification of Final Judgment, on BOC manufacturing of communications equipment (including CPE) were to be removed.

The recent wave of telephone company alliances with unregulated businesses exacerbates these problems. Current CPNI rules may permit carriers to pass on CPNI to these unregulated affiliates. As a result, these non-regulated businesses will share in the unfair competitive advantages resulting from access to CPNI. For example, a carrier could pass on CPNI to an affiliated company that would aid the affiliate in marketing CPE to specific customers of the carrier. In addition, dissemination of CPNI to unregulated carrier affiliates will further erode customer privacy.

The lower level of protection given to CPNI in the CPE context also distorts competition between non-carrier-affiliated CPE vendors and ESPs. Many customers' needs can be met either by a CPE-based solution or by a service-based solution. Consumer choice should be driven by market and technical factors. However, the current regulatory disparity artificially places non-carrier-affiliated CPE vendors at a competitive disadvantage in relation to carrier and non-carrier-affiliated ESPs.

The current regulatory imbalance also impairs customer privacy. The privacy of a customer's CPNI either is -- or is not -- preserved. Any benefit to customer privacy provided by the limits on transfers of CPNI to BOC or GTE personnel involved in the development or marketing of enhanced services is therefore obliterated by the transfer of such information to BOC or GTE personnel involved in the development or marketing of CPE.

Applying the prior authorization requirement to carriers in the CPE context will have the same benefits that the Commission's prior authorization requirement has had in the enhanced

services context: it will increase "competitive equity for a valuable market segment."⁸ In addition, by removing the artificial advantage that ESPs enjoy as a result of the greater regulatory protection given to CPNI used to develop and market enhanced services, the Commission can promote more vigorous inter-modal competition between equipment-based and service-based solutions to consumers' telecommunications needs. Furthermore, applying the prior authorization requirement equally in the CPE and enhanced services context will provide meaningful privacy protection by preventing carriers from using CPNI for any purpose other than the provision of basic telephone service without prior customer authorization.⁹

B. The Prior Authorization Requirement Should Be Applied to All Local Exchange Carriers.

While the BOCs and GTE are subject to modest restriction on their access to CPNI, the remaining LECs have unimpeded access to CPNI. That is, they may use CPNI for any purpose -- even over the objections of a customer. Such access severely erodes progress in achieving the Commission's competitive equity and privacy goals.

⁸ Computer III Remand Order, 6 FCC Rcd at 7611.

⁹ The current CPNI rules do not require the BOCs or GTE to obtain prior authorization before using the CPNI of customers with fewer than twenty lines for any purpose. Because non-carrier-affiliated CPE vendors and ESPs must obtain prior authorization before accessing the CPNI of these customers, the current rules provide the BOCs and GTE with a further competitive advantage. Moreover, by giving the BOCs and GTE access to the CPNI of residential and small business customers without prior authorization, the current rules have the paradoxical effect of providing the least privacy protection to those users that may have the most serious concerns about privacy. Application of the prior authorization requirement to these customers would promote competitive equity and protect user privacy.

Carriers obtain CPNI as a result of their provision of regulated telephone service. Like the BOCs and GTE, the independent LECs have the exclusive right to obtain the CPNI of most local exchange customers in their service area as a result of their possession of government-granted basic service monopolies. Consequently, unrestricted access to CPNI provides these carriers with a significant advantage over non-carrier-affiliated CPE vendors and ESPs. Moreover, just as with the BOCs and GTE, these carriers' use of CPNI for purposes other than the provision of regulated telephone service infringes customers' privacy interests.

Application of the prior authorization requirement to all LECs will ensure that no LEC can obtain an unfair advantage in the competitive CPE and enhanced services markets by using information gained in the course of providing regulated telephone service. This will better assure competition both within the CPE and enhanced services markets and between CPE-based and service-based solutions.¹⁰

C. Equal Application of the Prior Authorization Requirement
Will Not Unduly Burden Carriers.

The Commission previously concluded that its requirement that the BOCs and GTE obtain prior customer authorization before using the CPNI of customers with more than twenty lines to develop or market enhanced services does not unduly burden the BOCs or GTE.¹¹ Requiring

¹⁰ The Commission's notice requests comments concerning application of the CPNI rules to LECs other than the BOCs and GTE. Accordingly, IDCMA has limited its comments to the rules governing the use of CPNI by carriers in this market. However, IDCMA remains concerned about the ability of the vertically integrated AT&T and other carriers to use CPNI without obtaining prior customer authorization.

¹¹ Computer III Remand Order, 6 FCC Rcd at 7612; GTE Safeguards Order at ¶ 45.

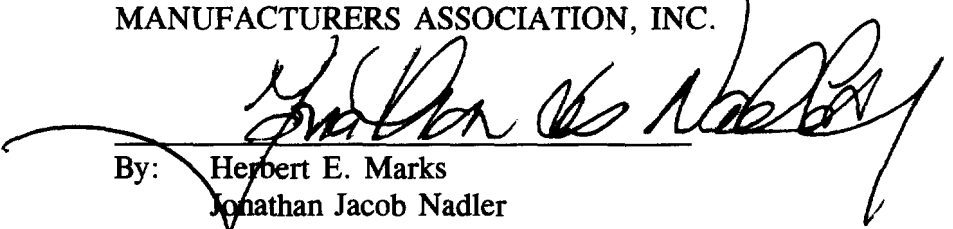
the BOCs and GTE to comply with identical procedures regarding access to CPNI by carrier personnel involved in the development and marketing of CPE will be no more burdensome. Similarly, there is no basis to conclude that application of these requirements to the remaining LECs will impose any undue burdens.

III. CONCLUSION

The current CPNI rules provide carriers with an unfair competitive advantage over non-carrier-affiliated CPE vendors and ESPs, distort competition between equipment-based and service-based solutions, and infringe customer privacy. To remedy these deficiencies, the CPNI rules applicable to the BOCs and GTE should be amended to apply the prior customer authorization requirement to carrier personnel who seek to use CPNI to develop and market enhanced services or CPE. The prior disclosure requirement, as so amended, should then be applied to all LECs. Such equal application of the CPNI rules will promote competitive equity and preserve user privacy without imposing an undue burden on these carriers.

Respectfully submitted,

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